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The Uniform Registered State Land and Adverse Possession Reform Act, a Proposal for Reform of the United States Real Property Law

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INTRODUCTION

As a result of legal fiction, the myriad state laws in regard to adverse possession pose a serious threat to our remaining wild lands. Under 50 different and peculiar statutes, a time limitations model functions in a manner well beyond the usual *statute of limitations*. It not only deprives the owner of his right to evict the trespasser, but by its operation, also may permit the court to grant title. There are various statutory time requirements for adverse possession, which may be as little as one, or as many as sixty years, depending on the specific purpose and on state law.[1] Assuming the taking is actual, open and notorious, exclusive and continuous, hostile and under claim of right, the trespasser may acquire a complete and fully legal title to the property upon often

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[1] *See* Linton v. Heye, 69 Neb. 450, 95 N.W. 1040 (1903), *aff'd*, 194 U.S. 628 (1904). The statute of limitations, respecting actions for the recovery of real property, is not open to the objection that it operates to deprive the owner of his property without due process of law. *See also* Martindale-Hubbell, New Jersey Law Digest, ADVERSE POSSESSION, by Reed Elsevier Inc. (2003), New Jersey has a 60 year statute and a 30 year statute, and one or the other applies according to the circumstances. Possession of uncultivated tracts is a 60 year limitation and other realty is 30 years, N.J. STAT. ANN. § 2A:14-30 (West). *See also* Martindale-Hubbell, Florida Law Digest, ADVERSE POSSESSION, by Reed Elsevier Inc. (2003), FLA. STAT. ANN. § 95.16, 95.18 (West 2004). Florida has a 7 year statute in general, but a 1 year additional statute, to make necessary tax payments if there is no color of title. "To acquire title by adverse possession without color of title, claimant must make return of property for taxation within one year after his entry into possession (95.18)." State adverse possession laws vary widely and this adds to their unpredictability. "Color of title" means an invalid deed, or other invalid, written document(s) purporting to convey title.

minimal or non-existent notice. The often inadequate notice also means constitutional due process rights are not being observed. The law of adverse possession, particularly as it continues to be applied in the United States, therefore operates under the *twin legal fictions* of *constructive notice and a radical statute of limitations* model. *Constructive notice* means the law states the rightful property owner is *actually or constructively on notice* that a trespasser is openly and continuously on his land. The reality, however, is the owner often has no indication or knowledge of the presence of the adverse claimant. Adverse possessors, for reasons to be explained, need only give an extremely minimal, *constructive notice,* to an owner of wild land.

It is not a goal of this article to analyze at length each of the elements one must fulfill to succeed in an adverse possession action.[2]. Instead, let us simply and very briefly note the general character of the possession required. In Arizona, for example, the possession must be a visible and uninterrupted appropriation of land, hostile and inconsistent in regard to the claim of the owner.[3] In short, the claimant must occupy the property, declare to all it is solely his, live on it openly, exclusively and ostensibly continuously, in a manner hostile to the owner's title. An adverse possession by inadvertence has been widely deemed to be "hostile." This usurpation of title may often transpire when the owner moves to evict the trespasser and the latter counterclaims in

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[2] Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession,* 89 GEO. L.J. 2419, 2422-24 (2001). Adverse possession requires proof the possession was actual, open and notorious, hostile, exclusive and continuous for the required statutory period. Payment of taxes and color of title may be relevant. "Actual" possession means the claimant uses the property as the true owner would. "Hostile" possession at least means the claimant's title is not a result of the owner's, as it would be, for example, in a landlord–tenant relationship. "Open and notorious" possession is visible to the owner or nearby landowners. "Exclusive" possession is not shared possession with the rightful owner. Since true owners exclude others in appropriate circumstances, an adverse possessor must do the same. Occasional use may qualify as "continuous" if the actual owner would use the property that way.

[3] Martindale-Hubbell, Arizona Law Digest, by Reed Elsevier Inc., 2003 Ariz. Sess. Laws 12-521.

adverse possession. Although the law is based on a fiction, its effects are very real.[4] If the time has expired for the true owner to evict the trespasser, then the court may rule in favor of the trespasser. Private owners and various forms of land trusts have fortunately now placed ownership of vast tracts of land in private ownership. [5] Protection of these wild lands is an important goal. There is a drive for environmental protection and preservation of the remaining, wild lands. There are hundreds of cases all over the U.S. where adverse possessors have, in effect, legally "stolen" wild lands and other kinds of real property.[6] One case held that hiking and hunting was sufficient to win ownership of forest land.[7] Uses that don't in some fashion "use up" or consume; or cultivate or fence the property, such as camping, berry picking and picnicking, are generally insufficient.[8] This indicates an outdated, anti-environmental bias in current state laws. Adverse possession was also found in regard to wetlands that were fished with traps tied to trees below the water line. Constructive notice was found, even though the owner could not see the traps! The court noted that the

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[4] *See, e.g.*, JEREMY BENTHAM, 1 WORKS 235, 268 (John Bowring ed., 1843). Jeremy Bentham referred to "the pestilential breath of Fiction," while quickly admitting, "with respect to . . . fictions, there once was a time, perhaps, when they had their use."

[5] John G. Sprankling, *An Environmental Critique of Adverse Possession,* 79 CORNELL L. REV. 816, 817-823 (1994). He notes the land area in private ownership is greater overall than the total land mass of Rhode Island, Connecticut and Massachusetts. He cites the development model (which unfortunately stresses "development" of wild or undeveloped property) and the fiction of "constructive notice." He notes "hundreds of other modern adverse possession decisions" are rationally explained by the development model, and not the fiction of constructive notice, upon which the limitations model relies.

[6] *Contra, Id.* at 832. A Frenchman traveling through America in the early 1800s observed about Americans: "There is in America a general feeling of hatred against trees. . . . They believe that the absence of woods is the sign of civilization; nothing seems uglier than a forest; on the contrary, they are charmed by a field of wheat." This quotation is attributed to Alex de Tocqueville. GEORGE W. PIERSON, TOCQUEVILLE AND BEAUMONT IN AMERICA 193 (1938).

[7] Butler v. Lindsey, 361 S.E.2d 621, 623-24 (S.C. Ct. App. 1987).

[8] Harmon v. Ingram, 572 So. 2d 411 (Ala. 1990).

claimant's activities were visible as he "blazed the trees and attached the traps."[9] These are some of the rules the courts apply to actions that require less overt acts to acquire adverse possession in regard to undeveloped or wild land.[10] Occasionally these cases may take odd turns.[11] Religious organizations are usually not exempt.[12] Government, however, is generally immune from the operation of the law.[13] Nor will adverse possession accrue against a state in regard to forest preserve lands.[14] A few narrow exceptions exist, however, in regard to the government immunity laws.[15] Briefly stated, this article is comprised of four main sections. The first part examines the history and scope of the legal fiction of adverse possession in the U.S.

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[9] Le Sourd v. Edwards, 86 N.E. 212, 213 (Ill. 1908).

[10] For purposes of this article, "wild land" is broadly defined as land that is either in its original, pristine condition, or land that has been cleared of trees, or cultivated, but that is now essentially returned to its natural state. "Undeveloped land" is substantially less pristine than "wild land." It was of course previously wild, but has been more recently cleared and has not yet returned to its natural state. It has no houses, other man-made structures, or utilities on it.

[11] Schoenfeld v. Chapman, 200 Misc. 444, 102 N.Y.S.2d 235 (1950), *modified*, 280 A.D. 464, 115 N.Y.S.2d 1, *appeal dismissed*, 305 N.Y. 698, 112 N.E.2d 779. Removal by hurricane of beach house from its original location barred application of this section. Adverse possession denied.

[12] Chavoustie v. Stone Street Baptist Church, 171 A.D.2d 1055, 569 N.Y.S.2d 528 (4th Dept. 1991). Adverse possessor gained title to a triangular section of church land by maintaining it, mowing it, planting a garden, and building a swimming pool and storage shed on the property, between 1974 and 1988.

[13] Trustees, etc., of Brookhaven v. Dyett Sandlime Brick Co., 75 Misc. 310, 135 N.Y.S. 165 (1912).

[14] People v. Shipley, 229 A.D. 21, 241 N.Y.S. 17 (3d Dept. 1930).

[15] *See, e.g.*, Lewis v. Lyons, 54 A.D.2d 488, 389 N.Y.S.2d 674 (4th Dept. 1976). Property held by the government in a business capacity *not* exempt. In Monthie v. Boyle Road Associates, 281 A.D.2d 15, 724 N.Y.S.2d 178 (2d Dept. 2001), the Court stated again the settled law that property owned by a municipality cannot be relinquished to an adverse possessor except when owned in a proprietary, non–governmental manner. In this case, the school board decided it no longer needed a 29 acre parcel and put it up for sale. This act, the court held, converted the lands municipal quality to proprietary, and made it vulnerable to adverse possession claims.

The second part comments on our current U.S. land title system, and on the multiplicity of state laws in effect. These laws are reflected in one or both of the two principal procedures: the title recordation system, in effect in all fifty states, or the registration system, concurrently in force in ten of the states. The advantages also will be introduced of England's two stage registration system, which obviates the need for a costly and usually unnecessary judicial proceeding.[16] Other topics include the legal fictions of constructive notice and a radical statute of limitations.

The third section in par focuses in on England's Land Registration Acts of 1925 and 2002 and will evaluate the current government guaranteed title registration system, in effect in England and apparently favored in some form throughout a substantial portion of the world,

This system will be compared to our current recorded title method, the latter which permits only the filing of evidence of title, *not actual title* itself. This note therefore places emphasis on registration, electronic or otherwise, of a title certificate. Greater security of title is paramount, and equally as important, registration decreases or nearly eliminates adverse possession. The lower cost and general facility and alacrity of the process will be positively compared to procedures utilized to record evidence of title.

The Land Registration Act 2002[17] will be evaluated and a fundamentally similar, registered certificate of title system

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[16] Barry Goldner, *The Torrens System Of Title Registration: A New Proposal For Effective Implementation,* 29 UCLA L. REV. 661, 690 (1982). *See also* A. SIMPSON, LAND LAW AND REGISTRATION 176-83 (1976). The English first created the concept of possessory *title* in 1857. It was contained in the report of Robert Wilson to the 1858 Report. The concepts were enriched upon in Lord Cairn's Land Transfer Act of 1875. The Act permitted registration on a voluntary basis.

[17] *LAND REGISTRATION ACT ON COURSE FOR OCTOBER IMPLEMENTATION, DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, (July 16, 2003)* [hereinafter Land Registration Act]. The Land Registration Act was approved by the Crown on February 26, 2002. This Land Registration Act 2002 (Commencement No. 4) Order 2003 (SI No: 2003/1725) formally confirms

proposed as an American solution. Certain modifications will better suit the registration statute to the United States. For example, where England's law is of a federal nature, *a Uniform Registered State Land and Adverse Possession Reform Act* will be proposed for this side of the pond. The rule of the situs of the property and other state laws tend to dominate real property law in the United States.[18] A registration system will be proposed as a two step process and the need to commence a costly and time consuming judicial trial or hearing will be largely eliminated. Due process of law and the U.S. Constitution will be fully complied with. *Actual notice, not fictional* constructive *notice,* as is often given today, will be given to all interested parties, and the radical statute of limitations fiction will be eliminated.

A brief, final section will draw some conclusions and evaluate the likelihood of a successful and widespread adoption of the new regime and what this will mean for the law of real property. An important byproduct will be a substantial elimination of adverse possession in the U.S.

Section I

A. Legal Fictions

It appears adverse possession claims are founded primarily on legal fictions. Fictions often have quite damaging effects on innocent parties and this is especially true of adverse possession in regard to the true owners. But what exactly is a legal fiction? A brief definition should aid us in the process of our analysis of the issues involved. A legal fiction has been accurately defined as:

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the planned implementation date. The Act came into full force October 13, 2003. Some provisions went into effect prior to that date. These include the Adjudicator's new office and the right to set the registration fees.

[18] *E.g.*, C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 82 (Winter 1987). He notes the ancient English adherence to the equivalent of our federal government in the US. In England, power tends to be concentrated. In the US, government authority is frequently subject to state's rights.

"(a)n assumption of fact deliberately, lawfully and irrebutably made contrary to the facts proven or probable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption being permitted by law or employed in legal science."[19]

In New York, by way of example, adverse possession requires clear and convincing evidence that the taking is hostile and under a claim of right, actual, open and notorious, exclusive and continuous for a period of ten years.[20] These are what we may characterize as the required, common law elements. Additionally, in New York, if there is no "color of title," i.e. no deed, or other written evidence of title, whether legally effective or not, then there is a statutory requirement. This rule mandates a minimum of some degree of "usual cultivation or improvement." Therefore, the presence of color of title may reduce the quantum of other evidence required. [21] Alternatively, the land if not cultivated or improved, must be "substantially enclosed." This will include a fence or similar barrier.[22] In other states a variation on these black

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[19] *E.g.*, Pierre J.J. Olivier, *Legal Fictions in Practice and Legal Science*, *in* 2 SOCIOLOGY, LAW AND LEGAL THEORY 1, 85–86 (Rotterdam University Press 1975)(a complete analysis of the history of legal fictions). The statutory and common law elements of the legal fiction are not revealed in the grammatical structure of the rules, thus, there is no hint of the fiction to the parties to litigation. Olivier believed this rather complete form of deception was a crucial factor in the definition framed by the so-called "civilian tradition."

[20] Jennings v. Fisher, 258 A.D.2d 722, 684 N.Y.S.2d 680 (3d Dept. 1999).

[21] Martindale-Hubbell, *supra* note 1. Several states also differentiate partly on the basis of whether or not the adverse possessor has "color of title," a few of these are as follows: Florida, FLA. STAT. ch. 95.18 (2002); Texas, TEX. CIV. PRAC. & REM. CODE ANN. § 16.024 (Vernon); Alaska, ALASKA STAT. § 09.45.052, 09.10.030 (Michie 2001); Arkansas, ARK. CODE ANN. § 18-11-106, 18-11-103 (Michie 1987); Colorado, COLO. REV. STAT. § 38-41-108 (2002); and Arizona, ARIZ. REV. STAT. § 12-523 (1956).

[22] N.Y. REAL PROP. ACTS. LAW § 522 (McKinney 2003). "For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial enclosure."

letter requirements generally exists in addition to the five common law elements.[23] In some states, when there is no written evidence of title, a state's adverse possession law may therefore be partly statutory (the cultivation or enclosure statute) and partly common law, i.e. the five elements, including a required taking that is "hostile and under claim of right." [24] Uniformity across state lines is not a hallmark of the 50 adverse possession statutes.

The law and fiction of adverse possession often leads to extreme emotions of loss, bitterness and tremendous frustration. This "legal" theft of land has been observed to be at times more wrenching than divorce.[25] It may seem easy therefore to adopt a

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[23] *E.g.*, Averill Q. Mix, Comment, *Payment of Taxes as a Condition of Title by Adverse Possession: A Nineteenth Century Anachronism*, 9 SANTA CLARA L. REV. 244, 250-54 (1969). Several states also require the adverse possessor to pay the real estate taxes as an absolute or alternative condition of the claim. These states are Florida, Idaho, Nevada, Arkansas, Colorado, Utah, Washington and New Mexico. *See also* Omaha & Florence Land & Trust Co. v. Barret, 31 Neb. 803, 48 N.W. 967 (1891).

[24] *E.g.*, Mack v. Luebben, 341 N.W.2d 335 (Neb. 1983), wherein 15 acres were adversely possessed by cultivation; *see also* Dowell v. Fleetwood, 420 N.E.2d 1356 (Ind. Ct. App. 1981) and Hayes v. Cotter, 439 So. 2d 102 (Ala. 1983), which both involved border strips lost due to cultivation. *E.g.*, Senn v. Western Mass. Elec. Co., 471 N.E.2d 131, 133 (Mass. App. Ct. 1984)(holding there would have to be fences to claim wooded area). When there is a "color of title" a more basic use of the property by the adverse possessor may suffice, but when there is only "a claim of right" there may have to be an improvement, enclosure or cultivation. Slight activities, well apart in time, may however be sufficient. *See also* Newman v. Cornelius, 83 Cal. Rptr. 435, 441 (Ct. App. 1970), stating only "slight use" of the property was sufficient if this is all the wild or undeveloped land permits. *See also* Lanning v. Musser, 88 Neb. 418, 129 N.W. 1022 (1911). In the case the land in dispute was not fenced in any way or enclosed and cattle belonging to the claimant, as well as to others, were able to cross over and eat the grass. The property in issue therefore was a common area grazed by livestock owned by many. There was no adverse possession that would "ripen into a title by limitation."

[25] *E.g.*, Steven Gardiner, *Land Grab, Adverse Possession Laws Leave Some Property Boundaries Open To Dispute*, COLUMBIAN, July 22, 2001, at E1. He notes the former president of the Clark County Home Builders Association in Wyoming, Albert Schotfeldt, an attorney, has said (it is implied from

facile approach and conclude that the law should simply be abolished entirely.[26] However in boundary disputes and possibly in a few other situations, such as equitable estoppel, the rule has had some justification at least under the present, outdated recording system.[27] We will see that under the present English Act there are three exceptions even to registered title in regard to adverse possession, and one of these is equitable estoppel.[28] The adverse possession legal fiction has, however, due to changing circumstances, the cultivation of wild lands, and the increasing population density, outlived its usefulness.[29] Adverse possession is potentially especially damaging to wilderness lands. These unspoiled and primitive areas have gained in importance in the United States in the last century. Therefore, this article is especially concerned with the impact of adverse possession claims on our remaining wild lands. The proposed, two step registration procedures will finally sound the death knell for most adverse

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experience) that adverse possession lawsuits can be "more traumatic than a divorce."

[26] *Cf.* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession,* 89 GEO. L.J. 2419, 2433-34, 2472-74 (2001). This Article posits that permissible adverse possession claims should be significantly reduced and reformed, but not necessarily entirely abolished. The American laws that supported the original English doctrines, it is worth noting, are now overshadowed by advances in survey techniques and improved record keeping.

[27] Bostick, *supra* note 18, at 59, 62, 80. A main reason the registration laws in effect in the U.S. have failed is the reticence of the courts to stick to enforcing the titles as per the registration certificates. The courts have been too preoccupied with weighing each situation as it makes itself known and then applying "equity notions of fairness." This is a bad idea as the conclusiveness of the registration is of the essence of the new system. An administrative "assurance fund" must be used to pay out money to cover claims where a party to the registration is injured by fraud, error or mistake. The registered title must be left intact. The assurance fund must be used to achieve a "just result" and there must not be a "dilution of the mirror quality of registered title." The legally enforceable title "mirrors" the registered title.

[28] Kate Cartmell, *Put Up the Shutters*, EST. GAZETTE, Aug. 17, 2002, at 91. Equitable estoppel makes an exception for equity as a general principal. It is what might be called a "catch–all" phrase. There are also two other exceptions.

[29] Sprankling, *supra* note 5.

possession claims in the United States. This will be a positive development for numerous reasons, and in particular with regard to private wilderness and undeveloped property in general.

B. Adverse Possession

Sometimes a brief analysis of the historical background of a rule may shed some light on how it came about, and where it may be going. If one examines the history of the peculiar concept of adverse possession, one finds there is little in the way of an English *common law* basis for the law[30], but there is some history of English *statute* in this regard, dating from King Henry the VIII. [31] Additionally, analogies exist in Roman law, even before the birth of Jesus Christ, in regard to landed patricians who became tenants of vast public lands at miniscule rents and then claimed their long and undisturbed possession of those lands should entitle them to ownership.[32] In the code of Hammurabi, if a Roman military man was away on a campaign for an extended period of time and another person cultivated his fields and occupied his

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[30] BENTHAM, *supra* note 4. Jeremy Bentham referred to "the pestilential breath of Fiction," while quickly admitting, "with respect to fictions, there once was a time, perhaps, when they had their use." *E.g.*, Dennis M. Gonski, *Real Estate Law Disrupting More Than a Half – Century of Accepted Law. Supreme Court Rejects Previously Accepted 20–year Statute of Limitations for Adverse Possession*, N.J. L.J., June 18, 2001. The common law was exclaimed in Edward Altham's case, 8 COKE REP. 147, 77 ENG. REPRINT 698, "For true it is that neither fraud nor might can make a title where there wanteth right."

[31] *Id.* Gonski. One of the earliest laws contained a 60-year statute of limitations as to real estate claims of a like duration. This was later reduced to a 20-year period of continuous possession as per 21, Jas 1, ch. 16. As Lord Mansfield proclaimed in Corporation of Kingston upon Hull v. Horner, Lofft. 576 (1774); "Possession is very strong; rather more than nine points of the law."

[32] *E.g.*, W.W. BUCKLAND, A MANUAL OF PRIVATE ROMAN LAW 355 (Cambridge University Press 1951). *See also Prescription and Adverse Possession, at* <http://chansen.tzo.com/Publications/Property Rights/Prescript.html>.

home for three years, the trespasser might be awarded title.[33] Rome in time honored this rule called "uscapio" in the Twelve Tables, about 500 B.C. This Roman law exhibited a tendency towards requiring an exploitive or active use of the land that has a surprisingly hollow and "modern" ring to it.[34] The legal fiction of adverse possession therefore has deep, entrenched and tangled roots that must be vigorously dealt with, not just timidly tweaked, to ameliorate the serious issues involved. In the U.S., England of course presents an important historical basis for adverse possession —and England long ago began the process of abandoning the cruel doctrine.

The 1275 Statute of Westminster marks one of the milestones in the law. It prohibited a suit to recover land if the claim existed prior to 1189. In the 1400s in England a gradual shift began as the medieval concept of seisin, or ownership based primarily on possession, gradually diminished in importance to mere evidence of ownership based on possession, and *not* ownership itself.[35] Most property in England as early as the fifteenth century was already fairly well populated and owners frequently resided on their land or nearby. Squatters were nevertheless not uncommon and coupled with crude surveys and a lack of readily available records; an adverse possessor's claim might not have always seemed unreasonable. The 1623 Statute of Limitations required that eviction suits be brought within 20 years. We have borrowed heavily on English law in the United States and this statute was a direct predecessor to our current statute of limitations model, in

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[33] *Id.* BUCKLAND. Adverse possession has ancient origins. There are early forms of the rule, such as contained in Hammurabi which dates to 2000 B.C., or over 4000 years ago.

[34] *Id.* The statutory period required was only two years and did not originally require good faith on the part of the trespasser. The good faith requirement later became part of the Roman law. Good faith should be a universal requirement in recorded title, as well as in registration of title.

[35] BLACK'S LAW DICTIONARY 1358 (6th ed. 1990), "Possession of real property under claim of freehold estate. The completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rights of homage and fealty."

regard to an owner's action against the determined trespasser. Constructive notice to the owner in the U.S. on wild lands today is however, practically speaking, often a legal fiction. Possession in England generally reflected an actual presence on the land, farming, hunting game and wood gathering for fuel. In the U.S., the minor activities of an adverse possessor then and now are not as likely to afford the same degree of actual notice.[36] The American owner historically sometimes is not as closely attached to his land in a physical sense, as is his British counterpart. To further obscure matters, each U.S. state has its own laws in regard to adverse possession. The situs paradigm of real property tends to control and therefore state law controls issues of title as well as adverse possession. The poor quality of actual notice and the lack of a uniform system further exacerbates security of title.[37]

Section II

A. The Recording System and Chain of Title Confusion

From the beginning of the nineteenth century, American courts gradually adapted English laws of property to the American wilderness experience.[38] Many records as to ownership are filed in

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[36] Sprankling, *supra* note 5. *See also* John G. Sprankling, *The Antiwilderness Bias in American Property Law,* 63 U. CHI. L. REV. 519, 526 (1996).

[37] Martindale-Hubbell (various law digests) ADVERSE POSSESSION, by Reed Elsevier Inc. (2003). There are statutes permitting adverse possession in all 50 states. A perusal of these laws reveals no two that are exactly the same! There are different rules as to the statute of limitations, ranging from two in Arizona; Arizona Civil Actions and Procedure, 2 years to recover possession of real estate as against person who claims real property by right of possession only; 12-522. *See infra* note 1, to sixty years in New Jersey. *See* Martindale-Hubbell *supra* note 1. Some states, such as Florida, require that the adverse possessor pay the property taxes on the land and some do not. Color of title, i.e. some sort of written document or evidence of title is important in some states, but not in others. The size of the property is apparently only relevant in Hawaii (subject property must be five acres or less) and the disability of the true owner is relevant in some states, but not in others.

[38] Sprankling, *supra* note 36, at 519–23.

local county clerk's offices.[39] The office takes the responsibility of saving and caring for these records and the owner is thereby relieved of this duty. Losses may still occur to these documents due to fire or flood. Gaps may occur in the chain of title if a deed is not recorded, an owner dies without a clear Last Will and Testament, or there is a carelessly processed tax or judgment foreclosure. As the decades go by, the task of searching an ever longer record grows more complex.[40]

Warranties of title accomplish little to reassure a purchaser in the recorded title scheme. These guarantees made by the transferor to the transferee may result in limited rights of recovery and do not possess a standardized meaning. It also becomes imperative to pinpoint the time at which the breach occurred and who will be held liable.[41] The multiplicity of issues involved in the warranty system undermines its efficacy.[42] More relevantly, the arduous quality of the complex and time consuming title search gave birth to the title insurance and title abstract corporations. These companies compile vast and frequently highly accurate title data

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[39] Bostick, *supra* note 18, at 61. Not all of the records relevant to a title search exist in the appropriate clerk's office. Other pertinent records may exist at a federal level, in a Town Hall, in zoning offices, in local and federal environmental protection agencies, and in courts of record almost anywhere. "The possibilities are extraordinary."

[40] R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY P83.01 (1993).

[41] Bostick, *supra* note 18, at 60–61; the injured party has to "travel up the chain of warranties" until a liable and solvent party is located. The dollar amount recovered may not be adequate to fully compensate for the loss. If the title proves defective, this may not be recognized for a long period of time. In this case, is the monetary loss computed at present value, or at value at time of sale to the present transferee? Another difficult issue is whether or not the covenant breached is one that "runs with the land." This issue lends itself to questions as to whether or not the transferee even has a valid suit against the transferor.

[42] *Id.* at 60. Sir Orlando Bridgman and others conceived of warranties in the deed as a way to discourage a grantor from conveying a defective deed. Today, in the US, the lack of standardized meanings is still a drawback to their usefulness (citing 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 605 (1924)). Sir Bridgman is frequently referred to as "the father of modern conveyances."

bases, which may surpass in completeness and quality the state or local government record bases,[43] The title insurance companies, and land surveyors, it should be considered, may have a vested interest in keeping the present system of recordation. Each new owner has to pay for a new title search, abstract of title and title insurance. Frequently a new or updated survey is also needed. All of these requirements add to the time and cost required to purchase real estate in the United States. A registration system is proposed that will proceed in two distinct steps and will be finalized with a certificate of government guaranteed, registered title, on file, on behalf of the owner. [44]

B. The New Jersey Experience and Adverse Possession Fiction in Disarray

There is at present little movement in the United States toward rectifying these issues, although a recent case in New Jersey has turned back the clock and rejected a 20 year statute, while imposing a 30-year/60-year statute. It is an example of the sorry state of the law and the proximity to real chaos it has brought the citizens of that jurisdiction. At least this case in one state shows there is desire for change. Longer statutory periods, however, do little to ameliorate the underlying problems. The J&M decision sets aside decades of New Jersey law, while the court carefully noted for the record that the change in law would have no retroactive effect.[45] The court stated in clear terms that New Jersey

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[43] R. POWELL & P. ROHAN, *supra* note 40.

[44] Bostick, *supra* note 18, at 59, "The successful system is one that is simple, accessible, inexpensive to administer once in place, and above all is reliable."

[45] J&M Land Co. v. First Union Nat'l Bank, and Jean S. Meyer v. R.C. Maxwell Co., 166 N.J. 493 (2001). This case was decided by the New Jersey Supreme Court in 2001, and clarified a longstanding judicial and academic controversy as to the four New Jersey adverse possession statutes. These were N.J.S.A. 2A: 14-6—20 years, N.J.S.A. 2A: 14-7—20 years, N.J.S.A. 2A: 14-30—30 years and N.J.S.A. 2A: 14-31—60 years. The decision rejects the 20 year rule and establishes a 30/60 year rule, at the court's discretion, according to the fact pattern in issue.

law in this regard had been incorrectly applied, due to an oversight, for over 50 years! While this case law is not as drastic a change as England's new statute, and is not a logical or a cohesive approach, it at least implies some dissatisfaction with the ridiculous, status quo. It is a move in some direction, if not ultimately the "right" or best direction. There is now no nationwide uniformity in the law. Once a number of the state legislatures vote to accept the proposed, uniform law, the legal climate in this regard will be a great deal more predictable. The new 60-year statute in New Jersey, when applicable, will be of the same duration as the original English law from the time of King Henry! The longer statute is a two edged sword. It requires the adverse possessor to complete such a long period of time that the rightful owner may be faced with witnesses and neighbors who will be testifying in advanced old age to matters that occurred when they were very small children. This method somehow does not seem particularly rational, or reassuring.

C. The Ameliorative Role of Torrens Title

However accurate the private or government databases may be, the owner is merely recording *evidence* of title, and not title itself.[46] The title companies, surveyors and attorneys may find all of this "wheel spinning" a welcome money - maker, but even the most knowledgeable buyer receives no more than a recorded *evidence of title, and* the constant, lingering threat of adverse possession claims. Scholars have found it rather amusing that many laws now abandoned in England survive in the U.S., such as the Rule In Shelley's Case and the strange, state by state current patchwork of laws in regard to adverse possession. [47] Actual title

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[46] *See* Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 664 (2003). *E.g.*, James R. Carret, *Land Transfer – A Reply to Criticisms of the Torrens System*, 7 HARV. L. REV. 271 (1891).

[47] *See e.g.*, Bostick, *supra* note 18, at 56. The Rule in Shelley's Case may still be extant in Arkansas, Colorado, Delaware, Indiana, North Carolina and Texas,

registration is more final, and less complex, especially in regard to subsequent registrations. It is also ultimately less expensive, faster and much more reliable.[48] Sir Robert Torrens began the method of the registration of land when he was the premier of South Australia. In 1858 he drafted the *Torrens Law.* This legal method is closely related to the Australian practice of title certification of ships, which increased ease of sale.[49] Many countries have now accepted the two step registration process as applied in England, or some variation thereof.[50] The Torrens System is as of this writing in effect in Australia, Honduras, the British Commonwealth, Vancouver, New Zealand, Wales, Jamaica and other countries, including many nations in Europe and Scandinavia.[51] The United States is, it seems, in the minority, still clinging to the obsolete, recording statutes.

In the far less economical, *one step registration s*ystem utilized in the U.S., today, a judicial hearing must always be held and a

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as of 1985. *See also*, L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1563 (1956 & Supp. 1985). The "Rule in Shelley's Case," reported by Lord Coke in 1 Coke, 93b (23 Eliz. In C.B.). The rule was taken as an element of U.S. common law. Strangely, the rule was not stated in Shelley's case, but was thereafter assumed to be accepted law. BLACK'S LAW DICTIONARY 1376 (1990). It basically says that when a buyer takes title by deed in freehold and there is a remainder interest of equivalent legal or equitable title to his heirs, as a class of persons to take successively from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.

[48] Szpszak, *supra* note 46. The author observes that several urban redevelopers who had to have reliable surveys of boundaries where there had been prior inconsistencies in the surveys.

[49] R. POWELL & P. ROHAN, *supra* note 40. Part VI ACQUISITION AND TRANSFER OF INTERESTS IN LAND, Chapter 83 REGISTRATION OF TITLE, 2.

[50] Goldner, *supra* note 16, at 662.

[51] *Id.* The Torrens systems use seems to be expanding to more countries and its use made more and more substantial in those countries. It has also been adopted in Countries as diverse as Uganda and Nova Scotia. *See also* U.S. DEP'T OF HOUS., 7 URBAN DEV., AM. LAND TITLE RECORDATION PRACTICES, STATE OF THE ART AND PROSPECTS FOR IMPROVEMENT 24 (1980). It appears to be only in the United States that land registration systems have not enjoyed success.

judgment issued, guaranteeing a clear title. Massachusetts presently allows as exceptions to the registration certain so called "off record" items such as some leases and liens, rights of way and easements that were not registered, errors in the survey and rights of a husband or wife to possession. [52] These items are so called "overriding" interests to the indefeasibility of the registered title.[53] It would be a perfect process if the registered title could be absolute and with no possible "overriding interests'' whatsoever. This is, unfortunately, probably not possible in the real world. Even with a few possible overriding interests, the Torrens system appears far superior to the recorded evidence of title system. Provision must certainly be made so that there will be a uniform list of all of the *exceptions and conceivable overriding interests* to the registration, and these will all be listed on the face of the registration certificate.[54] In any event, in regard to real property in general, including wild lands, the completed registration process will virtually eliminate adverse possession.[55]

In the proposed method, however, title will be issued according to the statements and affidavits of the parties involved, as a first step. In the second step, upon passage of a statutory period to be selected, such as five or ten years, a certificate of title will be issued administratively which will then be registered. Registered title will be created as per what we call "Torrens" title, and will be government guaranteed, with a minimal number of possible overriding interests.

Recorded title is achieved by *recording evidence of the owner's title;* registered title by *registering a certificate of title.*

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[52] *See* State St. Bank & Trust Co. v. Beale, 227 N.E.2d 924, 927 (Mass. 1967). A suit may be brought in Massachusetts however to challenge a fraudulent registration.

[53] MASS. GEN. LAWS ch. 185, § 46. Fraud, forgery and a provinces subdivision controls are also possible exceptions.

[54] MASS. GEN. LAWS, lists some other common exceptions. These are leases from one to three years in length. Appeals from the initial registration judgment; easements running to the populace at large; and possibly a few others.

[55] Cartmell, *supra* note 28, at 90-92. Current English law has three exceptions that still will permit adverse possession claims, even to registered property.

Adverse possession claims are permitted to bloom in an environment of record title, and would be quite substantially reduced in all of our jurisdictions via a registered *title* to real property, uniform law.

England's 1925 and 2002 statutes utilize a transitional period for the gradual phasing out of adverse possession claims.[56] This is an appropriate condition, which helps ensure due process. After the completion of the first step, and during the entire period of the second step, such claims could still be made in the U.S. as well. [57] Due process rights will be observed for all parties. This two step process is in effect as of 2003, in the 2002 statute, in England and Wales.[58] It does not comprise a costly process in England.[59] It need not be expensive in the U.S. either.

Procedurally, the 2002 statute states in its "explanatory note" that the 2002 Act repeals the Land Registration Act of 1925. These (new rules) "perform a similar function to the Land Registration Rules 1925."[60] England has been working on the adverse possession problem for over seventy five years and appears to have made considerable progress.

Sir Robert Torrens commenced the original method whereby title to land was registered. The process, as we have said, began in

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[56] *See e.g.,* Bostick, *supra* note 18, at 56. "This extraordinary legislation, which swept away much of the flotsam that had so long clogged the law of property, has reached mature years from which its effectiveness can be measured" (referring to the 1925 legislation in England).

[57] Any fraud or forgery claims would also be disposed of upon issuance of the final, certified and registered title.

[58] Goldner, *supra* note 16, at 690. The registration in England is based simply on the representations of the parties. It is the same two step process as is recommended herein for U.S. adoption. The administrator or registrar evaluates the correctness of title originally. As the statutory time passes, so too does the opportunity to contest title. When the time period is finished, the final certificate of title is granted and registered.

[59] *See* Fiflis, *English Registered Conveyancing: A Study in Effective Land Transfer,* 59 NW. U. L. REV. 468, 470 n. 12 (1964).

[60] Land Registration Act, *supra* note 17, The Land Registration Rules 2003, Explanatory note at 83. There are certain changes, such as a greater transparency in the 2003 law.

Australia and soon was practiced in much of Great Britain.[61] If the registration process is made unnecessarily complex, unreasonable delays may result.[62] The Torrens system, in general, is a method of creating a certificate of title and then registering a legal and basically absolute title to real property. This procedure, utilizing none the less, a judicial hearing to adjudicate all claims at the outset, was at one time in effect in 20 states.[63] At the present time only ten states still utilize the (one step) Torrens system. Eleven states have repealed the Torrens statutes.[64] In the remaining ten, in which the Torrens system is still in effect, the system is voluntary, and it functions side by side with the" old style," evidence of title

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[61] Goldner, *supra* note 16, at 662; *see infra*, notes 82-140. *See also*, Fiflis, *supra* note 59.

[62] CATHERINE FARVACQUE & PATRICK MCAUSLAN, REFORMING URBAN LAND POLICIES AND INSTITUTIONS IN DEVELOPING COUNTRIES 11-12 (World Bank 1992). The work describes the painfully slow, Cameroon land registration process. There are numerous steps involved in the burdensome process, which may take up to seven years to complete and ends with a presidential decree. These dilatory methods will not be adopted here in the U.S. We will employ the far quicker, two step procedure.

[63] Bostick, *supra* note 18, at 64. The comment is made that the voluntary nature of the registration system in the U.S. is a major reason for its undoing. There is probably an element of truth in this position. It is more accurate, however, to realize that if the registration process is made truly attractive in the first place, this will go a long way to solve the problem. Bostick also notes the "inevitable hassle and expense of initial registration." There is little doubt that the recorded system of title must be gradually phased out as new transfers of title are registered.

[64] R. POWELL & P. ROHAN, *supra* note 40, REGISTRATION OF TITLE, section 83.01, Origin, History and Current Status, p. 3, n. 8. The eleven states that have repealed are California, Mississippi, Illinois, New York, Nebraska, South Dakota, Utah, North Dakota, Oregon, Tennessee and South Carolina. Registration is most widely employed today in Hawaii, Minnesota and Massachusetts. Powell notes that Illinois and New York permit filing of the registered title certificate as evidence of title in the remaining *record title system* in those states. Powell also had conversations with several attorneys in the East who told him that several substantial timber companies had utilized the registration process so as not to have to worry about adverse possession claims. This was also apparently true of some large mineral corporations.

recording system.[65] The ten states are Colorado,[66] Georgia,[67] Hawaii,[68] Massachusetts,[69] Minnesota,[70] North Carolina,[71] Ohio,[72] Virginia,[73] Pennsylvania[74] and Washington[75] New York recently repealed its registration of title law.[76] In New York State around Buffalo and on Long Island there has been some use of the registration procedure.[77] The registration system, until fairly recently at least, was in substantial use only in Massachusetts, Minnesota and Hawaii.[78]

Massachusetts requires the typical filing of an action in the land court in which notice is given by publication to any and all adverse claimants. There is a judgment granted on the merits, versus those named by name, as well as those in the generic caption "to all whom it may concern."[79] The registration method therefore give a greater assurance to the owner, even as to *prior* adverse possessors, about whom a purchaser may know absolutely nothing at the time of taking title. These adverse possessors may

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65 *Id.*

66 COLO. REV. STAT. §§ 38-36-101 to 38-36-199.

67 GA. CODE ANN. §§ 44-2-4 to 44-2-253.

68 HAW. REV. STAT. §§ 501-1 to 501-211.

69 MASS. ANN. LAWS ch. 185.

70 MINN. STAT. ANN. § 508.

71 N.C. GEN. STAT. § 43.

72 OHIO REV. CODE ANN. §§ 5309 & 5310.

73 VA. CODE ANN. § 55.112. *See Comment, Yes Virginia-There is a Torrens Act*, 9 U. RICH. L. REV. 301 (1975).

74 PA. STAT. ANN. tit. 21, § 321, tit. 16, § 3708.

75 WASH. REV. CODE ANN. § 65.12.

76 N.Y. REAL PROP. LAW §§ 370-435, 436 (repealed). *See also* Colavito, *Vision 2000: A Status Report; Land Records Systems Affected*, N.Y.L.J., Aug. 18, 1997, at S16.

77 R. POWELL & P. ROHAN, *supra* note 40, at 2.

78 *Id.* at 3. *E.g.*, B. SHICK & I. PLOTKIN, TORRENS IN THE UNITED STATES 17-20 (1978); 4 AM. L. PROP. 17.39 (A.J. Casner ed., 1952); R.G. Patton, *The Torrens System of Land Title Registration,* 19 MINN. L. REV. 519, 520, n.29 (1935); R.G. Patton, *Extension of the Torrens System into Hawaii, The Philippine Islands & Latin-American Jurisdictions,* 36 MINN. L. REV. 213 (1952).

79 *See* MASS. GEN. LAWS ch. 185, § 26 (1991).

have established their claims, and then vacated the property previously, so that the buyer has no notice of them, whatsoever. The only exceptions upon completion of our *proposed* registration, such as mortgages, public easements, and government liens, will all be noted on the face of the registered title certificate, as issued by the administrator or registrar. It will be best to keep the list of possible overriding interests as short as possible, and in lieu thereof, permit compensation in case of certain losses, which appear inequitable, from the government sponsored assurance fund. It is important to distinguish "exceptions" such as recognized mortgages on the property, from *possible "over–riding interests"* such as equitable estoppel, as the term is applied in England's Land Registration Act of 2002. In the U.S. we may wish to limit the latter to an even greater extent than has been the case in England. Claims for registrar's error or fraud, for example, may be compensated out of a government sponsored so–called "assurance fund." In this manner, title to the property will remain secure and this will assure the continued existence and rapid acceptance of the new registration law in the U.S. The registrar must be an experienced, real property attorney, qualified to analyze a title insurance policy and title abstract, as well as any mortgages or other types of liens.

The states that have repealed have done so for various reasons, one of which may be the high initial cost of obtaining the certificate of title. Another sore point is the excessive amount of time involved, as all prior claims must be satisfied before the registered certificate of title can be issued. The one step process mandates a judicial hearing, a time consuming and expensive process, even if it doesn't appear to be necessary, as is probably the case over 90% of the time.[80] Permitting an ongoing, parallel system of record title, attractive only if compared to the present one step registrations, also may discourage a wide-spread acceptance of the more streamlined, two step registration system.

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[80] Goldner, *supra* note 16. *See also* Sabel, *Suggestions for Amending the Torrens Act,* 13 N.Y.U. L. REV. 244 (1935).

Differences between the U.S. and Britain as to these real property issues, particularly in regard to their effect on wild or undeveloped land, do exist. Over the last century, for example, the U.S. has turned vast, former wild lands to the plow and to "development" in all its forms. We are now largely a settled land, as England has been for centuries. There are also differences, however, because the U.S. is so much larger than England, and we presently have very large areas of wilderness in private hands. These lands must be protected against market forces of so called "development." The adverse possession rules are but developmental fictions in disguise. Therefore, due to our large, private wild lands, the Torrens method should, if anything, prove even more useful and effective in the U.S.

If the U.S. were to continue to require a court judgment to precede all title registrations, then the actions of the Adjudicator in Britain (Equivalent to our registrar) would violate the constitutional separation of powers in the U.S. Specifically, it has already been held to be unconstitutional for non-judicial personnel to issue judicial rulings.[81] A similar type of registration statute was also found to be unconstitutional in Ohio in 1896.[82] Due to the law of separation of powers in the U.S., it seems very likely the should such a case ever make its way up to the U.S. Supreme Court, the unconstitutionality in the U.S. of the equivalent of the English "adjudicator" position would be affirmed. The law was easily amended here however and provided for an equity court to issue a decree from which the registrar then simply issues the certificate, the registrar's input is no longer of a judicial nature and the

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[81] People v. Chase, 46 N.E. 454, 459 (Ill. 1896). This case lays out in no uncertain terms the unconstitutionality of the original Torrens statute as enacted in Illinois in 1895. The statute employed a so-called "registrar," who examined title and issued the certificate of title. Challenges to the certificate had to be filed within a five year period administratively and then there was permitted an additional final one year to file a court action challenge.

[82] Ohio v. Gilbert, 47 N.E. 551, 558-59 (Ohio 1897). The statute in dispute also gave judicial authority to the registrar in contravention of the law of the separation of powers.

constitutional infirmity is neatly excised.[83] This requirement of a judicial proceeding adds very considerable expense to the current, American method, but it is money that the registrant will not have to pay under the proposed, title registration. It will permit a two stage registration, with the title only becoming absolute, upon expiration of a statutory period. This initial stage will be simply based on the transferor's and registrant's affidavits, as well as the survey, abstract of title, and any other documents delivered to the administrator. An assurance fund, primarily to compensate for registrar's error, will also be set up, paid for with a registration tax. It will be in the amount of approximately one-half of one per cent of the assessed tax value, and a minimum fee of $50 to $100 may be appropriate. Liability against the government registration office will generally be secondary, with the exception of permitting a primary action against the registrar, for fraud of a party, mistake or registrar's error.[84] In other cases, wherein another party appears prima facie at fault, it may be more logical to acknowledge the primary liability of that legal entity or person.[85] If additional equitable exceptions are to be permitted in the U.S., as they are in Great Britain, then the assurance fund must be more substantially funded to make it possible to compensate a broader range of potentially injured parties. Any other overriding interests, such as boundary disputes, should be compensated for in a like manner. Registered title should be inviolable, virtually without exception.

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[83] People v. Simon, 52 N.E. 910, 911 (Ill. 1898).

[84] *But see* Goldner *supra* note 16, at 707. Goldner suggests primary liability against the assurance fund in basically all cases. The theory is put forward that if the injured party recovers from the assurance fund, then the injured parties claim against the damaging party shall be assigned to the assurance fund. The position taken by most other states is however that first one must attempt to recover from damaging parties. The latter process is clearly preferable. *See also Cartmell*, *supra* note 28; *see generally* Edbloom, HUD TITLE REGISTRATION REPORT, at v-47.

[85] *Id.*, Goldner. Goldner mentions a letter from a Richard W. Edblom that notes some practical problems with permitting an immediate suit against the Assurance Fund, even in situations such as where a mechanics lien was missed by the Administrator because proper filing procedures were not followed.

Compulsory registration need not be accomplished all at once.[86] Most land changes hands at least once each generation.[87] As a conveyance occurs, registration will be filed. This gradual process will avoid any need for an unnecessary and disruptive flood of registrations.

D. The Important Contribution of Tract Indexes and Marketable Title Acts As A Transitional Device

Tract indexes will gradually replace the grantor-grantee indexes still extant in some states. This improvement is very important to the successful registration system. A few states have already acquired the tract system, such as Oklahoma, Utah, and Wyoming.[88] The tract system permits a more efficient search of the records by placing on just one page all existing instruments and sales of the land. This method limits considerably any potential issues in regard to "chain of title." The system is therefore a valuable asset in a modern, title registration system.

So called marketable title acts have been seen as a possible, way to preclude claims brought on the basis of instruments beyond a certain age, commonly 40 years. These rules only serve to bar various sorts of claims that do not flow from conveyances filed on the record prior to the 40 year period. The marketable title acts, on the other hand, although marginally helpful to reduce old claims in

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[86] *Id.* at 670. Goldner *cites* U.S. DEP'T OF HOUS. & URBAN DEV., IMPROVING LAND TITLE REGISTRATION SYSTEMS III-15 to 17 at v-6 to v-8 (1979).

[87] *Id.* at 696. Property is constantly being bought and sold. He also *cites* Cross, *Weakness of the Present Recording System,* 47 IOWA L. REV. 245, 260 (1962). As to the general weakness of the recording system. *See e.g.*, Edbloom *supra* note 84, at V-6 to V-8. Discusses need to gradually phase in title registrants. *See also* Joseph Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property,* 6 J. LEGAL STUD. 213 (1977). There are about 91 million parcels of real property in the United States and about 9 million of these are conveyed in a given year.

[88] *E.g.*, Note, *The Tract and Grantor-Grantee Indices*, 47 IOWA L. REV. 481, 486-87 (1962). Generally, title companies now use the tract system in their data sets. The tract concept is virtually universally proposed as the method of choice, in any advanced, land registration system, by scholars and academics.

states utilizing a recording system, help little in regard to the registration system. This is because these acts are created to eliminate older, recorded title interests when a pre-designated, statutory period elapses. These laws will however remain useful in regard to existing, *record title* properties. The owner establishes an intact title chain back to the first *recorded* interest. Any property interests prior to or in conflict with that first recorded date are in theory, avoided. However, not all prior interests are capable of being extinguished, such as utility easements, reversionary interests and leases.[89] This will mean the title search, under the marketable title statutes, actually has to predate the *first recorded interest* with which the claimant can be associated. The prior parties affected negatively by these marketable title acts also generally receive no notice that their rights are being eliminated. The marketable title acts help us little with our proposed, title registration. When a buyer seeks to choose between recording or registering his title, his attorney will inform him that the recording statutes are no longer available for a new conveyance, that registration is required and is preferable anyway. At the time of the initial registration, a first page will be opened in a new, tract index book in the registration office. The familiar title searches, abstracts and title insurance will still be initially required, during the first phase of the first registration of a specific property. There will likely be no savings in a cancellation of the insurance, once the title becomes absolute. A major improvement, however, will be the elimination of prior as well as subsequent adverse possession claims once the statutory time has passed and the title is inviolable. Also, title insurance, title abstracts and land surveys should not be required for subsequent registrations. At present, purchasers of land are almost uniformly ignorant of the devastating possibilities of adverse possession, whether on wild lands, or a private home, that can result in large part from the decreased notice provisions

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[89] *E.g.*, Carl A.Yzenbaard, *The Consumer's Need for Title Registration*, 4 N. KY. L. REV. 253, 265 (1977).

that our courts have adopted.[90] Unfortunately, the claim has not been made that these marketable title laws, while ameliorative in some ways, bar subsequent adverse possession claims.[91]

E. The Registration Process and the Need for Title Insurance

The first registration of property in the U.S. could be charged at least in part as a public expense, so as to make the prospect more inviting, although this may not be necessary, as the additional costs will be reasonably modest. Drafting of the Uniform Statute in the U.S. will mandate a minimal expenditure at registration, in part to be paid to the assurance fund, and it may not be necessary to permit parties to the registration process to bring claims against the state's general treasury. This is important because serious problems developed in the past in states such as California.[92] Most other jurisdictions, however, have experienced no such problem.

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[90] Goldner, *supra* note 16, at 688 and note 130. Goldner notes that the purchase of a home for example, is often an individual's greatest lifetime purchase. Yet he is totally unaware of the need for a Torrens system to protect against adverse possession claims whereby he may potentially lose all title to his house and land.

[91] *See* marketable title acts of the states that have them. IOWA CODE § 614.32; CONN. GEN. STAT. § 47-33b-47-331 (2201) (40 years); IND. CODE § 32-20-3-1 (2202) (50 years).

[92] *See* the California registration statutes, Torrens Land Title Registration Law, 1897 Cal. Stat. 138, as amended 1915. Amended Cal. Stat. 1932. The California statute was repealed in 1955 due to problems with the state assurance fund. California's fund became bankrupt. Payments from the general revenues of the state are now possible if the assurance fund is insufficient in Hawaii, Massachusetts, Minnesota and North Carolina. HAW. REV. STAT. § 501-211 (2002); MASS. GEN. LAWS ch. 185, § 104; MINN. STAT. § 508.77; N.C. GEN. STAT. § 43-52 (2002). This is of course a separate but related issue as to whether or not liability of the assurance fund will be primary or secondary. It is preferable to permit almost no overriding claims against the registered title. Claims will be usually against third parties who are prima facie liable on a primary basis. Claims will be against the assurance fund on a primary basis, only if no third party has prima facie liability.

The process of registration in Massachusetts may provide some insight into issues raised by the one step registration process.[93]

In any event, for purposes of the need to limit adverse possession claims, the record title system also permits the legal fiction to widely manifest itself. "Tacking-on" is also permissible in adverse possession. Claimants may tack together successive adverse possessions.[94] On the other hand, exceptions such as mortgages and other liens or judgments may be added to or deleted from an easily amendable, certificate of registration. Transitional registration books should not be needed as there is no urgency to start registering all titles at once. The *record* process will simply gradually phase out over several decades. It is evident that the *registration system* is as capable of being updated as is the *record system.* One substantial difference, however, is that each registration, once completed, will not be subject to many "overriding interests, so-called "off the record conflicts," such as adverse possession claims, old judgments and matrimonial liens.

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[93] A call to the deputy recorder of the Massachusetts Land Court in October of 2003, for example, led to some light being shed on registration practices. She confirmed a court action was required and there would be a final judgment. Time to begin and complete the actions varied from one to ten years. The costs paid to the Land Court in fees alone include a $700 filing fee and excluding private attorney's fees, may amount in all to several thousand dollars. Massachusetts does have a parallel, and much more popular recordation system. Once registered, a claimant cannot argue for adverse possession. She also noted that a substantial number of the persons registering their property for the first time are adverse claimants! They are seeking a survey by the Land Court to clarify the boundaries, and also apparently are familiar with the risks and uneasiness caused by a potential adverse possession claimant! With registration, they "can rest easy."

[94] *See* Brand v. Prince, 35 N.Y.2d 634, 364 N.Y.S.2d 826 (1974). Claimant's predecessors intended to and did convey their possessory interest in a ten acre property to claimants when they bought an adjoining parcel. Claimants were permitted to tack their possession onto that of their predecessors to acquire title by adverse possession. *See also*, Brant Lake Shores, Inc. v. Barton, 61 Misc.2d 902, 307 N.Y.S.2d 1005 (1970). Several deed descriptions contained part of the property claimed adversely. Herein, we may recall the concept of "color of title." The plaintiff grantee was allowed to tack on his immediate predecessor's possession as well as possession and occupation of his predecessors.

These interests would trump the registered title and damage public confidence in it. Still, the criticism has been made, with some accuracy, that because of the time and expense involved, the old, one step process is better suited to large commercial transactions, rather than to smaller residential purchases.

There is also the possibility of employing an action to quiet title as an alternative to registration. The drawback, however, is the fact that an adverse possession occurring *after* a recorded purchase is not protected against. Adverse possession is one fiction that may possibly become a real problem after purchase, and because there is nothing comparable to the degree of title uncertainty caused potentially by this factor, the proposed registration process is needed. The proposed two step method is preferred. This will preclude adverse possession claims from arising post purchase, and from surviving as a pre-purchase claim, once the statutory period has expired. What is needed in the U.S. is an abbreviated procedure, similar to the English method, utilizing what has been previously described by one prescient author as a two step, "possessory title registration".[95] Title insurance continues to play an important role in our new Torrens Title system. While the argument has been made that title insurance in combination with a record title provide an adequate remedy, this is apparently incorrect as title insurance, while it may cover adverse possession claims, only gives a monetary reimbursement, and does not at all protect title to the *land itself.* If one is primarily concerned with the *land itself,* as one would generally be, the money is not adequate compensation! It has been noted that title insurance is only moderately expensive. Perhaps this is in part because the possible monetary payment is, except in a few cases in which the true

[95] *See e.g.,* Goldner, *supra* note 16, *citing* R. HOGG, REGISTRATION OF LAND THROUGHOUT THE EMPIRE (1908); A. Simpson, *supra* note 16 at 254–55. The time period for the running of the statute from first registration to final registration certificate that is inviolable, will have to be worked out by the drafting commission of our new uniform state code. Perhaps a maximum of ten years or thereabouts may be determined to be appropriate. If it is too long a statute this may mean title is less secure; if too brief, lien holders may not receive the due process they are entitled to.

owner wished to sell anyway, a wholly inadequate remedy! The abbreviated, two step method would not require any judicial proceeding and would, like the English method, initially simply register the title based upon the party's affidavits, the title abstract, and any mortgages or other relevant documents. The title then gains in reliability the longer it goes unchallenged. The drafters of the uniform act in the U.S. will select the statutory time period required. It must be long enough to permit proper notice to all concerned parties, but brief enough to not unduly delay a completed registration. Five or ten years, more or less may be a good starting point for discussion. At the first filing application, the administrative official responsible for the registration will make an initial decision as to apparent validity. This simplified process will drastically reduce potential costs.[96] Once the statute of limitations selected has run, there can be almost no adverse claims, and few if any other claims brought to challenge the registered title. As there will be no judge and no judicial proceeding, the time and money involved is substantially reduced. The court proceedings now employed in the states already having registration laws are largely exercises in behavior that appears somewhat obsessive anyway, as little is generally uncovered in the way of a cloud on title.[97] The entire process of a court hearing is largely unnecessary. Title insurance, plus a title registration assurance fund, to guard mainly against registrar's errors and cases of fraud, will provide more than adequate security for all parties concerned. These added safeguards will make possible a highly secure, and hence universally acceptable, government guaranteed certificate of registered title to the real property. In cases of fraud, the assurance fund will bear secondary liability. Liability will only be primary if

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[96] *Id.* Goldner; *see also* Fiflis, *supra* note 59, at 470 n.12. This government official may well be an attorney, specialized in real property transactions.

[97] *Id.* Goldner. Proposed possessory title registration complies with the due process requirements of the 14th Amendment to the Constitution. In Minnesota, about 99% of original title registrations are not contested. *See* Sabel, *supra* note 80.

an action against the defrauder fails or initially appears to have little or no chance of success.

F. The Land Development Paradigm and The Legal Fiction Of Constructive Notice

In the U.S., a vigorous land development paradigm led to the legal fiction of "constructive notice" in regard to an adverse possession, even where there really was no actual notice to the original owner at all. This was the result of a bias early employed by our courts that favored the settler who actively developed wilderness land as compared to the speculator who just let it lie idle. Relatively innocuous, often largely unnoticed activities by a claimant, were to be acknowledged in this system as imparting "constructive notice." Hence, the legal fiction as to constructive notice developed in the U.S.[98] In one case areas of swamp which occurred seasonally on a 15 acre property were thought to be suitable by an adverse possessor for the placing of fish traps. These 20 traps were tied by cords to trees below the water line and were therefore invisible from the land! The record owner argued this trespass was not open and notorious.[99] Title was granted to the adverse claimant, despite the logic of the rightful owner's defense.

Because U.S. real property state law examines adverse possession in terms of the character of the property in issue, less activity by the adverse possessor is required on wild or unimproved lands than on cultivated or developed property.[100] This

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[98] *E.g.*, Sprankling, *supra* note 36, at 526.

[99] Le Sourd, 86 N.E., at 213. Unfortunately for the record owner, the court held the invisible fish traps "constituted a visible appropriation of the land for the only purpose for which the land could be used."

[100] Maine, Arkansas and Illinois have adverse possession statutes that encourage claims versus unimproved, absentee owner properties. *See* ARK. CODE ANN. § 18-11-102 (Michie 1987 & Supp. 1993), which states that on "unimproved or unenclosed" property, one may gain title by paying the taxes for 7 years in addition to "color of title." Section 18-11-103 thereof creates a presumption of color of title if one pays the taxes for 15 years on "wild and unimproved land." *See also*, ME. REV. STAT. ANN. tit. 14, § 816 (West 1964 &

primarily common law doctrine may well require constant and costly monitoring of one's undeveloped property. Court sanctioned "takings" (thievery) of agricultural produce on the wild land, or some sort of "taking" of game, cutting firewood, or capturing fish may be viewed through the lens of the courts as an "improvement" and evidence of a proper adverse possession. Winning claimants in numerous actions have succeeded with a combination of seemingly minor activities. Hunting and hiking was enough in a case in Missouri.[101] A determined trespasser in Alabama gained title due to some grazing of cattle, cutting down trees and hunting.[102] This adverse possession bias in regard to wild lands is one of the more serious flaws of the current statutory and common law. The key to the sorry state of U.S. real property law today is the land development paradigm.[103] Current New York procedural law, as to notice requirements, we have already seen, makes important distinctions between claims absent a written instrument and those in which there is such an instrument, albeit a defective one. Hence, once again, the term, "color of title."

Adverse possession in general has a long history, both in the United States and in England.[104] Procedurally, in New York, if the claimant is able to prove the first four elements, then *hostility*, the final element, is presumed. At this point, the burden of proof shifts to the original holder of title to rebut the presumption, by the same

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Supp. 1992), a statute which provides that color to title requirements are reduced if the property consists of "uncultivated lands." Colorado has a statute actually granting ownership to one who pays the taxes for 7 years with color of title on "vacant and unoccupied land."

[101] Kline v. Bourbon Woods, Inc., 684 S.W.2d 938, 940 (Mo. Ct. App. 1985).

[102] Pierson v. Case, 133 So. 2d 239 (Ala. 1961).

[103] *E.g.*, Alaska Nat'l Bank v. Linc, 559 P.2d 1049, 1054 (Alaska 1977)(referring to a productive use of the land as one of the motivating factors); Armstrong v. Cities Serv. Gas Co., 502 P.2d 672, 680, (Kan. 1972)(referring to a "beneficial and productive use" of the land).

[104] In Virginia, in 1646, what we now call adverse possession existed. The statutory period was five years. *See* Percy Bordwell, *Disseisin and Adverse Possession*, 33 YALE L.J. 1 (1923), who remarks on the birth of the phrase as attributable to a 1757 English decision, Taylor d. Atkyns v. Horde (1757 K.B.) 1 Burr. 60, 119.

standard employed in most civil litigation, a fair preponderance of the evidence.[105] Possession plus actions carried out in error are a common and valid way to prove "hostile acts."[106] Proof tends to be somewhat more laborious, absent "color of title." Only some paper documentation is required however, and it is always imperfect in some manner, otherwise obviously one would have a proper deed and no adverse possession claim would be necessary.

There has been a great deal of debate in the literature as to whether or not good faith is a requirement of a valid adverse possession.[107] This does not appear to always be the case, but it does provide less of an obstacle, in many cases, to a favorable judgment Payment of taxes also is a significant proof in some jurisdictions, tending to add to proof of adverse possession, as well creating an appearance of abandonment by the original owner.[108] Government property is again generally exempt from a claim of adverse possession.[109] Good faith and color of title has little affect against government owned property.

These requirements to prove adverse possession, with or without "color of title," as well as good faith requirements, burdens of proof etc. are all relevant to existing, recorded title. Today, for

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[105] *See* Kraft v. Mettenbrink, 5 Neb. App. 344, 559 N.W. 2d 503 (1997)(holding that initially the adverse claimant must prove by a fair preponderance of the evidence, that he has been in actual, continuous, exclusive, notorious, adverse possession, for ten years; the burden then shifts to the original owner).

[106] *E.g.*, Katona v. Low, 226 A.D.2d 433, 641 N.Y.S.2d 62 (2d Dept. 1996). "Hostility" is presumed.

[107] MARTINDALE–HUBBELL, notes Washington state for adverse claim requires, "Person in actual, open, and notorious possession of lands or tenements continuously for seven years, in good faith and....." Louisiana requires "Continuous and uninterrupted possession of an immovable for ten years under just title acquired in good faith... "

[108] *E.g.*, Tourtelotte v. Pearce, 27 Neb. 57, 42 N.W. 915 (1889); Omaha & Florence Land & Trust Co. v. Barrett, 31 Neb. 803, 48 N.W. 967 (1891); Dredia v. Patz, 78 Neb. 506, 111 N.W. 136 (1907); Walker v. Bell, 154 Neb. 221, 47 N.W. 2d 504 (1951). *But see* Olwell v. Clark, 658 P.2d 585 (Utah S.Ct.). The payment of taxes by a co-tenant is obviously not such evidence.

[109] *See e.g.*, Topping v. Cohn, 71 Neb. 559, 99 N.W. 372 (1904).

example, the owner of record has to prove a negative, and rebut the presumption of hostility and adverse possession, once the adverse possessor has met his burden as to the first four elements. It is very hard to prove a negative, that the record owner usually must demonstrate by documentary evidence or by obtaining witnesses who were formerly neighbors of the adverse possessor and have actual knowledge of, for example, disputed boundaries. In New York, when required (i.e. absent color of title), the requirement of a fence or wall would generally be the type of impediment that would keep out trespassers.[110]

Alternatively, the adverse possessor may show the property was "usually cultivated or improved." [111] To prove the required exclusive ownership, the adverse possessor must establish possession and occupancy" of the land in terms of the "nature and situation of the property and the uses to which it can be applied." Thus, wild or uncultivated or improved lands today require far less to create an adverse possession claim, as to the *exclusivity* factor, than do so-called "improved" lands. This distinction has been criticized in the literature as causing a bias against leaving wild lands in an undeveloped state. The risk is not only the potential for development by the adverse claimant. The record owner also feels he needs to improve the property in some way to ensure his ownership of it. He too feels obligated to cut down some trees, build a road, or harvest fish or game, so as to assert his ownership to his land in the manner accepted by the courts today. The observation has been made that the law is tilted now not to title, or even possession, but rather to economic development and that this is detrimental to environmental concerns.[112] The continuity requirement also has been applied in keeping with the type of

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[110] *E.g.*, Morris v. DeSantis, 178 A.D.2d 515, 577 N.Y.S.2d 440 (2d Dept. 1991).

[111] *E.g.*, City of Tonawanda v. Elliot Creek Homeowners, 86 A.D.2d 118, 449 N.Y.S.2d 116 (4th Dept 1982.)

[112] Sprankling, *supra* note 36. He argues for building an exception into the law as to wild lands. His suggestion is a good one but should be taken even further to include all properly registered real property, in order to defeat the adverse possession legal fiction.

property. In regard to wild lands, this has been interpreted by the courts to mean occasional or seasonal trespassing is adequate to establish this element of adverse possession. This is especially true if the court holds the land is only productive on an *intermittent* basis. Therefore, in terms of exclusivity, an intermittent trespass will suffice. There is, however, no inherent legal right to trespass another's land. A landowner has the right to exclude trespassers as is stated by the United States Supreme Court, as well as by state statutes. [113] No owner is required to stand idly by and allow another to become an adverse possessor!

In any event, even though situations may arise in which a judgment of adverse possession is fair and equitable under present record title circumstances, examples in the United States of proposals for meaningful new statutes are rare. Only two states have any exemption from adverse possession for wild lands.[114] A "new law" is needed to deal adequately with the serious short comings in present statutes, whose variety also allows for no united front in the important goal of a thorough reformation of the law. A state-by-state attempt at a patchwork solution will not solve the problem. What is needed is a uniform state law that will ensure the broadest possible acceptance by all. The heart of this uniform rule will be the Torrens Law, with a two stage process. A select

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[113] MARK R. FERRAN, RIGHTS OF NY LANDOWNERS TO USE FORCE (DISPLAY GUNS) TO STOP, DETAIN, EXPEL AND ARREST DEFIANT TRESPASSERS (OR SUSPECTED LAND-THEIEVES, ETC.) 1 (2003)(citing Dickman v. Commissioner, 465 U.S. 330, 336 (1984) "The ownership and possession of property confer a certain *right to defend* that possession, [including] a defense of it which results in an assault and battery, and that which results in the destruction of the means used to invade and interfere with that possession"). *See also* N.Y. PENAL LAW § 140.05, offenses against real property and the right of the owner to exclude intruders from his property; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)(this "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. . . . Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property").

[114] A 1991 amendment to the Massachusetts law excludes some non-profit owners. MASS. ANN. LAWS ch. 260, § 21. New York has also exempted owners of certain easements for environmental purposes, but not fee simple owners.

committee should be formed as soon as possible for the purpose of this important, preservationist goal. The select committee should be comprised of prominent jurists, knowledgeable real property attorneys and distinguished scholars. No detail should be left to chance in this crucial undertaking. A representative or liaison from each state would help ensure later passage of the law in each jurisdiction.

G. The Statute of Limitations Legal Fiction in the Existing Recording Statutes

From a comprehensive point of view, a second, central part of the legal fiction involved, in addition to the constructive notice fiction, is the position taken by the courts that the purpose of adverse possession law is a statute of limitations subsequent to which no claim may be brought by the rightful owner to evict the trespasser. But this does not explain what the courts are doing however, as a statute of limitations normally extinguishes the remedy, but not the right, whereas the courts broadly interpret the applicable, statutes of limitation, to also erase the rightful owner's title to his own land![115] Adverse possession to the contrary, is not a mere rule of procedure. It is about land *development*. A concept in many instances out of touch with today's widely held goals of land preservation and protection of wild lands as well as wild species of plants and animals contained thereon, of all kinds.[116] This skewed

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[115] *See generally* Sprankling, supra note 5; *E.g.*, R. POWELL & P. ROHAN, *supra* note 40, at 1017 at 91-109 to 110. Remarks on the paradoxical dismissal of the actual right to the property, and not just a bar to the action in ejectment. There appears to be no statutory basis for the court's attitude.

[116] Sprankling, *supra* note 5, at 1. "The American wilderness is dying. At the dawn of the nineteenth century, over 95 percent of the nation was pre-Columbian wilderness." Genetic diversity is also part of this debate. As wild lands are turned to more "productive" uses, this diversity is lost. With it are lost many potential cures for disease, and the long term health of the planet is negatively impacted. A less complex gene pool in an individual tends to lessen resistance to disease, and also to risk climactic change. Even observed from a narrow and selfish view of what is best for Mankind, this does not bode well for

and largely unacknowledged thrust of the law in the courts is highly characteristic of other legal formulas riddled with fictions.[117] It is very hard to succeed in modifying the fictional rules herein because the actual intent and motivation has changed so much over the years that the fiction as originally employed no longer serves any practical purpose.[118] The courts are not following the implicit purpose of the rule and hence logical change becomes all the more difficult to achieve. Simply put, development of wild lands, or taking developed land from rightful owners, no longer serves a valid societal purpose. It endangers the environment, wastes money, diminishes the monetary value of property and

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our future. The water quality worldwide is deteriorating as is the quality of the air we all breathe. One wonders if the loss of genetic diversity due to genetically altered food sources crowding out natural foods is progress or regression? Would planting genetically altered crops on someone else's land for the statutory period constitute adverse possession under present law? Apparently, yes!

[117] Familiar analogies exist in our *civil forfeiture l*aw and in its highly fictitious concept of the "guilty object in rem." The thrust of the law in this area is all about locating and placing on trial in civil court non–living entities such as houses, boats and automobiles that are "guilty" of crimes, so that they may then be forfeited to the government. How a house can be "guilty" of anything, or have a bad intent, is an interesting question. In these civil forfeiture suits the burden is ultimately on the owner of the property to prove a negative, that the property was not involved in any wrongdoing. This remains true in regard to the Civil Asset Forfeiture Reform Act of 2000, despite other ameliorating aspects of this recent federal legislation. In adverse possession, the burden is ultimately on the owner to disprove the claimant's often vague allegations of continuous possession and the other elements, including completion of a required statutory period of time. One of several realities in adverse possession is that it is *actually* about property "development" and not a statute to give the property thief so-called "repose."

[118] *See generally* LEONARD W. LEVY, A LICENSE TO STEAL, THE FORFEITURE OF PROPERTY (University of North Carolina Press 1996). One advantage to the possibility of reform of the adverse possession laws is that these laws do not put substantial money into the government's pockets. This is not true of the forfeiture laws which fund state and federal law enforcement with hundred's of millions of dollars a year, in light of the fact that many positive changes were made to the forfeiture laws in the Civil Asset Forfeiture Reform Act (CAFRA), it should not be as difficult to amend the adverse possession laws.

reduces certainty of real property titles. It also may increase litigation costs substantially. But the courts, lulled into a risky complacency by the narcotic of these long standing legal fictions, cannot easily change, absent an act of the legislature. Now our courts ostensibly believe they are simply enforcing statutes of limitation, which have expired without any real notice! A *Uniform Registered State Land and Adverse Possession Reform Act is* the best way to solve the problem, as this will provide needed uniformity, for which there is now a lack thereof, and also permit some flexibility in the manner in which each state interprets the statute. This flexibility will lend strength. England is making significant progress in these goals but has chosen to pass a nationwide law, for both England and Wales, equivalent to a U.S. federal statute. The instant proposal is for instead, a *uniform state law*, appropriate in the U.S. in regard to deference to the state and local law applicable under our situs of the property rule.

Section III

A. England's Land Registration Acts of 1925 Eliminated Certain Cotenancies

Six major property statutes were made law in England in 1925.These laws cleared the way to move on to a new and more reliable and cost effective procedure in English title law. [119] These acts were The Administration of Estates Act, the Trustee Act, The Law of Property Act, the Settled Land Act, the Land Charges Act and the Land Registration Act. For our purposes, the last four are the most relevant. [120] They contributed the most to the Land

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[119] Bostick, *supra* note 18, at 3, "The philosophy of an ideal system is that it provides, as conclusive title binding all the world, a state-guaranteed registration evidenced by a certificate which reflects the exact state of the title at any moment in time."

[120] *Id.* at 79.

Registration Act 2002.[121] There have been, of course, some modifications.

A method of simplifying title in England eliminates some forms of cotenancies, i.e. the tenancy in common and the tenancy by the entirety as to married couples, the joint tenancy survives but there may be no more than four to a property. Although the tenancy by the entirety has been eliminated in Britain, some retracing appears to be occurring in this regard. Second, by virtue of a trust mechanism, equitable estates and interests were removed from the legal title in the registered certificate. Instead, these interests were transferred into the fund created by the sale and the money paid out of the trust to the trustees of the equitable interests.[122] Careful evaluation must be made of this method to determine if it has any efficacy in the U.S. By this method overriding interests could be funded and separated from registered title this would eliminate issues of property interests coming back to life many years in the future. Such ancient interests may complicate a simple and secure title registration.

Concurrent estates were thereby significantly limited in English law, and this has simplified registration.[123] Only the joint tenancy remains.[124] One might however question the wisdom of removing from the law the tenancy by the entirety that is available to married couples. Perhaps we can learn from both the valuable example, as well as the possible excess of zeal of the English

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[121] *Id.* at 77. "In the four acts discussed . . . Parliament was concerned with four broad legislative purposes." First, reduction of the number of possible legal estates, i.e. the co tenancies. Second, by registration to provide title that would mirror the exact state of title on an ongoing basis. The title is also guaranteed by the government, and created by the judiciary (in England). Third, to "sweep equitable estates and interests off the legal title and into the fund created by the sale of the land." Fourth, the four acts would provide protection for "commercial" (read non-family) type liens.

[122] *Id.* at 84–85.

[123] *Id.* at 78. English law has also limited legal estates to the fee simple and the term of years.

[124] *Id.* at 85. England now allows ownership only as a trust for sale as joint tenants. Cites Law of Property Act §§ 34(2), 36(1). The number of joint tenants is limited to a maximum of four. Section 34(2).

lawmakers. England has had problems in this regard and one proposal there is that the matrimonial home be treated as a form of communal property.[125]

B. England's Successor Land Act of 2002

On October 13, 2003 the Land Registration Act 2002 went fully into effect in England.[126] Although there are obvious differences between the general characteristics of land in the United States and England, there are also certain similarities. For one, the United States has become more densely populated in the last two centuries and has moved closer to England in this regard. Of course there is still much more undeveloped land in the U.S. The wild west days of vast, very low cost land in the U.S. are, however, substantially over. Random, unchecked development in the U.S. is no longer seen as a desirable, national goal[127].

The 2002 Land Registration Act builds on the success of the 1925 Land Act. The changes in English law under the 2002 Act provide for two years notice to all persons who wish to appropriate title by adverse possession (or other means) through the judicial process. Far from being a statute that merely circumscribes the legal fiction of adverse possession, it instead creates a

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[125] *Id.* at 109-10. *See* Law of Property Act, ch. 20, sched. I, part VI. The tenancy by the entirety was deleted from English law many years ago, but this proposal appears to be a round about way to return to something like it.

[126] Cartmell, *supra* note 28, at 90. Aims to strengthen the rights of landowners against adverse possessors. One English case that apparently brought these issues to the fore was Lambeth London Borough Council v. Blackburn 2001 EWCA Civ 912 (2002) 33HLR 74. A substantial alteration in the law had already been proposed by London's Law Commission in 1998.

[127] Sprankling, *supra* note 36, at 530, The Wilderness Act of 1964 safeguards millions of acres of wild lands owned by the government on behalf of the public. 16 U.S.C. § 1131 (1994). Wilderness land is also owned privately in many forms. The Nature Conservancy is dedicated to protection of these lands and had ownership of an area larger than Vermont as of the 1990s. *See also* Felice Buckvar, *Helping Mother Nature: A Job for Volunteers*, N.Y. TIMES, June 5, 1994, at 14; Chris Bolgiano, *Private Forests: The Lands Nobody Knows*, 96 AM. FORESTS 30, n.74 (May/June 1990).

comprehensive land registration process and also provides for registration of all commercial leases of seven or more years. More information on the register, the theory goes, means fewer possible overriding interests. At the same time, a pilot program for electronic filing and registration brings the statute fully into compliance with 21st century technology. This electronic program will be carefully tested out and evaluated in England before it is fully implemented. Even prior to utilizing its electronic provisions, the 2002 Act will provide considerable advantages over current U.S. law. Actual notice by the claimant to the rightful owner will bring back due process of law to U.S., real property adverse possession claims, for the first time in over a century. Something we have in our Constitution and the English paradoxically lack! Yet they provide for due process notice in their statute and we fail miserably to do so. Actual, as opposed to fictional notice, will lend greater dignity to both the judiciary and the rule of law. It is reasonable and logical this shall occur specifically in regard to *registered real property* and will not apply to the still unregistered. This is important simply because there are undoubtedly situations wherein it is just and equitable that adverse possession should be applied, but in principle primarily *only as to* unregistered realty. The registration itself provides a greater clarity and ease of identification. It also legally excludes most possible exceptions to the registered title. The actual exceptions to the inviolability of the title vary according to the law of the jurisdiction. In Great Britain, a certificate of title ensures no adverse possession claims, with three exceptions. In all other cases, it will have to be on notice to the registered owner, who may then object to it and effectively block it legally and with a high degree of confidence as to the outcome.[128]

English registration under the Act of 2002 also tends to clarify underlying facts that help ensure due process of law. Balance and a sense of proportion should be achievable in the U.S. as well, in a

[128] Cartmell, *supra* note 28, at 2. Note that where the registered owner opposes the adverse claim and an order of eviction is obtained, the original owner must evict the claimant within two additional years, or the former may lose title.

manner specifically tailored to our needs, because the greatest economy, fairness and certainty of title in the real estate arena will result The current regime creates uncertainty and thereby inevitably reduces the value of real property and permits other negatives, such as an over abundance of adverse possession litigation and instability of title. The goal of preservation of our remaining, privately owned wild lands is thereby also placed in unnecessary jeopardy. A continuing state of denial by our courts and legislatures helps no one and only perpetuates a wasteful and ignorant state of affairs. The litigation encouraged by the legal fiction of adverse possession drains money and other resources away, in unnecessary litigation and in a reduction in value of the property itself. The multiplicity of relevant laws in the 50 states adds to the confusion, permits a lack of stable and dependable title, and increases the uncertainty that accompanies endless title litigation.[129] It is important also to acknowledge that the registration system in England is not voluntary, but does provide for a transition period in which adverse claims may still be filed, and advances a practical method whereby the cost of registration is normally rather modest. These are all things the commission to be formed on the new, uniform statute, should take careful note of.

C. The United States and England, Confronting the Legal Fictions

In the United States the legal fiction of adverse possession dates to the early 1800s. The fledgling republic borrowed on the English traditions. The U.S. government owned vast tracts of land, and homesteads were available to settlers willing to stay on their newly acquired property and cultivate it for specific, required periods of years,[130]

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[129] MARTINDALE – HUBBELL, *supra* note 1. No two of the fifty (50) states have exactly the same adverse possession statute.

[130] *See e.g.*, Mills v. Traver, 35 Neb. 292, 53 N.W. 67 (1892); Kimes v. Libby, 87 Neb. 113, 126 N.W. 869 (1910). Acquisition of title under the United States homestead law gave one a valid title. If another sought adverse possession against the homesteader, the statute of limitations did not begin to run until all

In centuries past, we recall, adverse possession laws had early roots first in the ancient Jewish texts of Hammurabi, then Roman law, next English statute and finally in the black letter law of the New World. The legal fiction usually functioned as a means to end disputes over title to real property and may have on occasion had a salutary effect on what might otherwise have been violent land disputes. Today, however, vast areas of unclaimed land have significantly diminished in size, or even vanished in some states. There has been a corresponding increase in price per acre, and the current, chaotic rules have acted to foment violence, rather than to quell it.[131] The large, private tracts of land provide an additional incentive to banish adverse possession and its handmaiden, the land development paradigm. Adverse possessors today rarely advance any interests of society, the economy or the environment.

From an analytic standpoint, the question arises whether the legal fiction's effect is in any way a positive one. It has been said that once the usefulness of a legal fiction has passed its prime, the fiction should be repealed as soon as possible. England established adverse possession long before colonial America, and now appears to be in the process of unraveling and largely discarding the archaic law — unlike the United States.[132] The 2002 Act[133] will seriously limit claims as to land registered correctly in the proper real property clerk's office, and establishes relevant procedures in

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acts required by law for the homesteader to obtain his patent (title) had been completed.

[131] *See e.g.*, Gardiner, *supra* note 28. Surveys prior to purchase are highly advisable and can avoid many disputes by putting potential purchasers on notice of volatile boundary line issues. The former president of the Clark County Home Builders Association in Wyoming, Albert Schlotfeldt, an attorney, has said that adverse possession lawsuits can be "more traumatic than a divorce."

[132] Cartmell, *supra* note 28, at 90. Kate Cartmell is a solicitor in the real property division of Nicholson Graham & Jones of London, England. It is implicit that a comprehensive, nationwide system of land titles, with computer access and control, would seem to be highly practical and money saving here as well.

[133] Edbloom, *supra* note 17, ENGLAND AND WALES. The Land Registration Rules 2003, at 8. Effective in October of 2003 in England and Wales.

regard to adverse claims...[134] In the U.S. we should carefully study a similar regimen, but with compulsory registration of all new real property sales. Perhaps here as well, it would be best to leave current state laws largely intact in regard to recorded titles. As most property changes hands fairly frequently in the long view anyway, this retention of prior law will dwindle in impact over time. Because the fact patterns in regard to adverse possession are so diverse, the new uniform statutes have to provide a logical way to approach highly varied problems. The Registered Land Act of 2002 favors one who possesses a deed in correct and legal form, and who has successfully filed and registered that title in the appropriate government office. On the other hand, the owner of mere recorded evidence of title will see virtually no change in the law.[135] The registered owner must simply keep the record clerk apprised of a current address for notice purposes. This obligation is obviously crucial to the owner who wishes to protect his land against adverse possession.

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[134] *Id.* The 2002 Act also allows the squatter to apply for registration after only 10 years. Under prior English statute, Section 15 of the Limitation Act 1980, a squatter in possession for 12 years continuously, could not be evicted. Under the new law, a principle difference is the owner of record must be notified and will have 2 years notice to commence an eviction proceeding. The eviction order must then be enforced within an additional 2 years of being granted. If this is not accomplished, the squatter may apply for title. The actual statute has some changes over the 2002 Act, but will still be effective on October 13, 2003. Certain provisions are however in effect as of this writing. An Adjudicator to HM Land Registry and the power to set registration fees are in effect, as well as other provisions. The final form is the 2003 No. 1417 Land Registration, England and Wales. The rules are made under the 2003 No. 1417 LAND REGISTRATION, ENGLAND AND WALES, The Land Registration Rules 2003, Made 19 May 2003, laid before Parliament 5 June 2003, coming into force October 13, 2003, 82 page statute.

[135] Cartmell, *supra* note 28, at 91. (The 2002 Act does not alter the law in regard to an adverse possessor who claims against unregistered land. Existing law will continue to apply. Inspections of the property by the owner will therefore be required, just as they are in the US. The current advantage in Great Britain, however, is that the owner may go ahead and register his property and obtain all of the available concurrent benefits).

As a peripheral benefit, costly and wasteful monitoring of wild lands will also be virtually eliminated. As it stands now, the lack of meaningful notice is particularly a problem where the land passes by inheritance and the new owner fails to promptly inspect. In these or other cases the owner is occasionally never even made aware that someone is trespassing on his property. The proposed method in the U.S. could go even further and allow for almost no adverse possession claims at all, once the statutory period has expired, following the first stage of the registration process. Alternatively, if greater flexibility is sought by our select committee and by our lawmakers, something similar to the English two year notice period may be adopted. It may be best to keep in mind however, the fact that England has never had as serious a problem with adverse possession as we now have in the U.S. A rigorous procedure with extremely few and limited overriding interests seems called for. Our government assurance fund will be able to make injured parties whole again, when no other party is prima facie, primarily liable. While the latter situation will permit direct suit against the responsible party.

English law possesses a transition period for adverse possessors to file their claims. If a squatter is able to already prove 12 years of adverse possession as of October 13, 2003, the date the new law goes completely into effect, then the owner will not have a defense. [136] We will need to formulate a similar, transition rule. A law making it difficult if not impossible for an adverse possessor to gain title to registered real property however would seem to also comply with requirements of a libertarian view of real property law, as well as due process, and constitution based notice provisions. In the U.S. at present, for example, the adverse possessor need not even be in possession of the owner's land at the time the owner purchases it.

At the same time, we should learn from the English rule and provide only limited protections for *unregistered property*. The protection should, in a general sense, be least for the legal owner

[136] *Id.* at 92. (In this case, the adverse possessor may go ahead and apply for registration himself, even if the application is made *after October 13, 2003*).

when the *adverse possession is* based on a recorded, written claim of right; a little greater protection for the true owner if the adverse possessor has a defective, recorded title, and the greatest protection to the original owner when the adverse claim has no color of title at all to back it up. This generally mirrors current law in the states in the U.S., such as New York. Once again, there should be balance in this vein of the proposed law as well. Some allowance should be made for judicial discretion as there are innumerable possible fact patterns in the cases. The English law does an excellent job of covering the logical and equitable exceptions. There are three main areas of exception in The Land Registration Act of 2002. First are situations generally involving equity by estoppel in favor of the adverse possessor.[137] Second applies to the situations where the adverse possessor has taken by will or intestacy. Another party has purchased and lived on the land for 10 years as per a valid contract but has never been the recipient of the deed. [138]Third, boundary disputes, where relatively small strips of land change hands.[139]

The 2002 Act in general requires all registered owners to be given notice of any adverse claim to the property. The owner then receives 2 years in which to oppose the registration and obtain a judgment of eviction from the court. This order must also be carried out within a second, 2 year period, Failure to evict the trespasser within the second, 2 year period, may well lead to title

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[137] *Id.* at 90-92. (In these three exceptions to the Land Registration Act, the duly registered owner *will not* be able to preclude the adverse possessors' action).

[138] *Id.* at 91. *E.g.*, Lambeth London Borough Council v. Blackburn, 2001 EWCA Civ 912 (2002). (Evidently, a notorious case in England in which a squatter forced his way into a house and then lived there for 12 years, even though he admitted he would have been willing to pay the rent. This helped support feelings in Parliament about the need for a new law into focus. The squatter then applied for title and was successful).

[139] *Id.* (the 2002 Act will not change existing law as to unregistered land at the time of the adverse possessor's application. However, under the 2002 Land Act, section 15 no longer applies to registered land. Adverse possessors will have to apply for registration after 10 years adverse possession. The statutory time period was 12 years under the 1980 Act).

being awarded to the adverse possessor.[140] Mortgagees and registered owners must be very careful to keep their addresses for notice purposes up to date on the register. Mortgagees receive notice of an adverse claim, just as owners do, and therefore a mortgage lien will be discharged if the claimant is successful.[141]

The issue of whether good faith is required by law in the U.S. at the present time, and what the new law in the U.S. must contain in that regard is another important issue. [142] We will see the importance of employing a good faith standard in the future in that regard. [143] For example, under existing U.S. law, what is to stop an unscrupulous seller of adjacent land from adding on to the breadth of the land spoken to in the deed and the survey, with the collusion of the buyer? A so called "straw transfer" should not be countenanced by our courts. In effect, there is always a method to create a so-called "color of title" in the purchaser, by careless, reckless or fraudulent means. At least in some situations, this seems illogical, counterproductive and a government acquiescence in the fraud of the adverse possessor. One may well ask, does the adverse possession occur due to bad intent, recklessness or mere mistake or negligence? These are determinations to be made by the tryer of fact and only simple negligence, never bad intent, should prevail under all but the most extreme circumstances. Some of these changes could be made in the present recording statutes as an interim improvement. One may wish to evaluate the state laws of

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[140] *Id.* at 91.

[141] *Id.* at 92. (The 2002 Act permits their lien to be removed from the registration. It is thereby of course eliminated. The mortgagee must be sure the legal owner is taking all appropriate steps to evict the trespasser. Alternatively, the mortgagee as an interested party, may bring his own eviction proceeding).

[142] MARTINDALE–HUBBELL, *supra* note 1. Washington, Louisiana and Hawaii require "good faith."

[143] *See* Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28, 30 (1952). In this odd case the court threw out an adverse possession based on a garage encroachment, because the claimant "thought he was getting it on his own property." The Maine doctrine established in this case seems to require bad faith in boundary disputes.

Washington, Louisiana and Hawaii, which all require good faith in some degree.

It is hoped that as there is a real and perceived increase in fairness and due process of law in this regard in our courts, so too will violence and ill feeling in land litigations wane. There will be a decrease, probably rather substantial, in the number of adverse claims.[144] As is true of U.S. state law in general, there will be a place for common law to play an important role, especially in the interpretation on a state by state basis of possible exceptions *which do not directly contradict. the uniform law.* These exceptions, however, should not be allowed to override the registered title. Perhaps the English method of paying into a trust, managed by the trustee for that specific interest, to reduce the number of equitable interests, may have merit. Of course known liens, mortgages, etc. may simply be listed on the face of the registered title. The statute will prohibit adverse possession as a general rule, if the rightful owner has a land title that has been prepared and registered correctly in the appropriate office, and above all that has been on file for the agreed upon, requisite time period. This statutory scheme will give both the stability and flexibility that is necessary, fair and conducive to protection of the environment and wild lands, as well as appropriate commercial interests. These competing goals need not be in direct conflict, as they unfortunately are today. The present U.S. condition of constant litigation is not a necessary by-product of a modern, real property registration plan.

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[144] Michael P. O'Connor, *Adverse Possession — Alive and Well in the 1990's,* 70 N.Y. STATE BAR JOURNAL, Jan. 1998 at 14 (1998). Adverse possession cases are frequently litigated in the New York Appellate courts. From 1990 to 1998, for example, there were over 100 cases decided. Adverse possession was found by the New York Court of Appeals in one out of four cases. Adverse possession, from 1990 to 1998, was found in the Appellate Division, as follows: First Dept., one of three cases; Second Dept., six of twenty-one; Third Dept., nineteen out of twenty-nine and Fourth Dept., six out of seven cases.

D. England's Example and Further Reflections On A Uniform Land Law For The United States

The 1925 Act required registration of all leases over 21 years in length. This was reduced to leases in excess of seven years in length, which means a great many more leases must be registered under the terms of the 2002 Act. This does not appear at first glance to be appropriate in the United States, but our uniform law may actually provide for registration of leases. The concept merits careful consideration.[145] The more real property interests on the registration records, the less we need to concern ourselves about as conceivable overriding interests if there is error or oversight.

The provisions of the 1925 Land Registration Act cloaked the registered owners in secrecy.[146] Absent a court order, or the consent of the owner, which would be difficult to accomplish without knowing who the owner is, you could not examine the register documents.[147] This rule is changed and the registration becomes a public document, with certain exceptions, in the 2002 Act. v In the U.S., we have a tradition of keeping our real property records as public documents and we should keep to this. The

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[145] Bostick, *supra* note 18, at 81. He notes that under the 1925 Land Registration Act & 19 (2) (a), confusing distinctions are made as to which leases had to be registered. This however has been modified in the 2002/2003 Act as all leases over 7 years must be registered rather than the prior 21 years. If the confusion can be removed as to which leases must be registered, then it may be advantageous to require registration.

[146] *Id.* at 76. It is a byproduct of English history that secrecy has long been felt to be appropriate in regard to ownership of real property. The 1925 Act mirrors this outlook. This love of secrecy works against the registration system and the Land Act of 2002 eliminates it. We must have open access to our title registration records in the U.S. as well. "If the information on a register is more open, it is more likely that the system will work as intended in conveying notice."

[147] *Id.* at 77, referring to the 1925 law... "the land register is not a public document." *See*, The Land Registration Act § 112 and 112(2)(b)(i) and 112(1). This confidentiality has been largely eliminated in The Land Registration Rules 2003. Certain forms and "exempt information documents" are nevertheless still not open to the public eye.

English exceptions primarily involve temporary or incomplete forms. Also, all copying must be done in the "presence of a member of the land registry."[148] Increased supervision over and above that normally observed in the clerk's offices here in the U.S. also may be desired, to help prevent error, unauthorized removal of documents and related issues.

The new American law will speed up real property sales and reduce the costs of making a transfer of title this should be a positive development for owners, buyer and sellers alike. A fully electronic system should be created in the near future in which title may be created and transferred. Consideration should be given to a reduction of those concurrent cotenancies that may complicate the registration process. The question arises should we adopt the English method and eliminate the tenancy by the entirety? It is certainly not a given that we should do so, particularly as England has done so and has already encountered some problems in this regard. Certain reductions in complexity could increase certainty of title and reduce the examinations required to safely convey title. Registered owners will have a better, more secure title and greater protection against adverse possessors. No matter how long a trespasser-squatter has been on the land, he will not be able to apply for title as registered owner, if the owner objects, except possibly in narrow and clearly defined circumstances.[149] Our legislators will have to decide precisely what, if any, overriding interests should be permitted. It is hoped these will be as close to zero as reasonably possible and that the assurance fund will be adequate as a safeguard as well. In any event, all overriding interests, which can contradict or modify the information in the registration, must be codified and listed on the certificate. Many of the proposals from which we may work are already contained in

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[148] 2002 No. 1417; Land Registration, England And Wales, Made 19 May 2003; laid before Parliament, 5 June 2003; coming into force October 2003; p. 49, Inspection and Copying.

[149] Dep't for Constitutional Affairs, *Land Registration Act on Course for October Implementation*, Quoting David Lammy, Minister at the Department for Constitutional Affairs, HERMES DATABASE. July 16. 2003

the English law and have largely been the law in England since 1925 and have greatly lowered costs and increased efficiencies.

The English law is administered by an administrative officer called an "Adjudicator" to "Her Majesties Land Registry." This is a new office created in England. It is a portion of the law that became effective prior to October 13, 2003. The adjudicators' task will be to settle disputes involving land registration applications. A similar, specialized office may well be advantageous in the U.S. as well, and may be an aid in further streamlining our system. Our registrar may be labeled" Real Property Registration Administrator," or simply "The Registrar." Certain problems that cannot be rectified by our registrar will have to be addressed by the courts, in keeping with general constitutional procedures and mandates. The original order in the form of the government guaranteed certificate of title will issue from our administrator, in compliance with our United States doctrines of separation of powers, and the requirement of an independent judiciary. England's Land Registration Act already possesses such possible recourse to the courts and our uniform state law in the U.S. shall as well. If a disputed issue cannot be settled by the parties, access to the court will always be available.

Conclusion

It requires a short sighted attitude to continue to cling to the discredited, land conveyance, recorded title method. The criticism is made that registration, although almost completely doing away with sometimes infuriating and disastrous adverse possession claims, is "too expensive and time consuming" to ever be widely accepted here in the United States. The fact remains, however, that when a land owner loses his property to a long term trespasser, a land thief, labeled in the law euphemistically an "adverse possessor," there can be no amount of money saved in the conveyance recording scheme to compensate for the terrible financial and emotional loss to the true owner. One wonders if many of the attorneys and academics who now argue that the

registration system is "unworkable" will not in fact be among its greatest champions when the *two step registration* method becomes the universally accepted procedure and signals the dawn of a new age of security and due process of law in real property in the U.S. It should be both less expensive and less time consuming than the present system in the United States. There is every reason to believe the future for this process is very positive.

It is also important to note that in the last thirty years in the U.S., general environmental goals have undergone a broad shift, and will in all likelihood continue to gather momentum, towards preservation of wild lands, as well as wild species of animals and plants. The importance of genetic diversity in our quest also cannot be overstated. Law can and should play a proactive as opposed to reactive role in this endeavor.

In England, despite or perhaps because of the heavy "development" of wild lands that has occurred there over a far longer time frame than we in the U.S. are confronted with, the transition of statutory law from a developmental goal to a preservation initiative is well underway with the implementation of the 2002 Registered Land Act. We in the U.S. are well aware that our land law system has not kept pace with a similar change in long term goals about security of title and the protection of the environment. Our archaic real property laws encourage a false "development," frustrate true title security, and perpetuate the odd and disturbing specter of the adverse possessor. This legitimized property thief, if we call him what he is, often masquerades successfully under the guise of now familiar legal fictions. This legalized theft of land is erroneously characterized by our judiciary as merely the enforcement of a "statute of limitations". This we know is one fiction. A second is what the courts call "constructive notice." In the process, these trespassers seize the land and what little wilderness remains is further placed in harms way and possibly compromised.

It is time our legal system caught up with our newly environmentalist public policies. A new and effective legal regime should be finally created, confidently, thoroughly, and without

hesitation. The two stages, Torrens registration process, will be at the heart of our new uniform, state statute. This will provide both uniformity and the desired flexibility. It is time to legislate out of American law adverse possession and its harsh legal fictions. Private land owners and our wild lands will be the winners.